82-1687

NO.

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ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

GEORGE WUAGNEUX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an unattached probable cause affidavit or the specialized knowledge of executing agents can cure a search warrant which standing alone fails to meet the particularity standards of the Fourth Amendment?

2. Whether the manner of execution of a search warrant is constitutionally over-broad when specialized knowledge and discretion of the officers and not the teachings of the warrant guided what was seized?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family, and the United States of America.

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NO.

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OCTOBER TERM 1982

GEORGE WUAGNEUX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioner, GEORGE WUAGNEUX, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion, and order of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 23, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix attached hereto and is reported as United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982). A petition for re-hearing and/or suggestion for re-hearing en banc was rejected on January 14, 1983, and is included in the Appendix. A copy of the transcript of the district court's oral order denying suppression is also contained in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment from which review is sought was rendered August 23, 1983. An order denying re-hearing was entered January 14, 1983. On March 11, 1983, Justice

into question.

The Petitioner, GEORGE WUAGNEUX, was the owner of Sage Corporation, a general construction company, which during the early 1970's was the largest employer of union help in South Florida. The Sage offices were located on the top floor of 1250 East Hallandale Beach Boulevard, Hallandale, Florida.

In 1977, Department of Justice Attorney Martin Steinberg and Internal Revenue Service (IRS) Special Agent Vincent O'Dea, as part of a joint IRS - Department of Justice investigation of one Seymour Gopman, drafted an affidavit seeking a warrant authorizing the search of the offices of Sage for records they believed to be relevant to the Gopman investigation.

On August 3, 1977, the affidavit was presented to a United States Magistrate who issued the warrant authorizing the search of Sage.[2/] The affidavit was thereupon sealed.

That afternoon, Agent O'Dea held a meeting with ten (10) to twelve (12) agents totally unfamiliar with the Gopman investigation or Sage Corporation - "warm bodies" - and briefed them on the search that was soon to commence. At that time, O'Dea told the agents of the investigation leading up to the search and supplied them with a list of names of various Sage entities. O'Dea told the agents to review the documents located in their assigned areas, pull out

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2/ Footnote 5 of the opinion of the Eleventh Circuit (United States v. Wuagneux, 683 F.2d 1343, 1350 (11th Cir. 1982)) sets out the warrant in detail. (Appendix p.A-25).

those they thought relevant and leave them for O'Dea or Steinberg to decide whether to seize. At the search site, this is precisely what occurred. The search took two days to complete. Somewhere between 50,000-100,000 documents were seized.

The Petitioner filed a lengthy motion to suppress which contained a multi-pronged attack on the warrant and manner of execution of the search at the offices of Sage Corporation. He contended inter alia:

1. The warrant was a general one failing to meet the Fourth Amendment's requirement of particularity; and

2. The manner of execution of the search was impermissibly overbroad.

Following evidentiary hearings, the District Court denied the motion to suppress in all respects.

The case then proceeded on to trial and convictions as set out supra resulted. Those convictions were affirmed (United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982)) and a petition for re-hearing was denied on January 14, 1983.

REASONS FOR GRANTING THE WRIT

I. NEITHER AN UNATTACHED PROBABLE CAUSE AFFIDAVIT NOR THE SPECIALIZED KNOWLEDGE OF THE EXECUTING AGENTS CAN CURE A SEARCH WARRANT WHICH FAILS TO MEET THE PARTICULARITY STANDARD OF THE FOURTH AMENDMENT.

The warrant in this case failed to meet the Fourth Amendment requirement of particularity. In speaking of the particularity requirement, this Court has said:

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196, 48 S. Ct. 74, 76 (1927) [emphasis added]. See also Andresen v. Maryland, 427 U.S. 463, 480, 96 S.Ct. 2737, 2748 (1976); Stanford v. Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 512 (1965); Weeks v. United States, 232 U.S. 383, 389-391, 34 S.Ct. 341, 343 (1914).

This requirement was derived from Colonial America's aversion to writs of assistance and general warrants which placed broad discretionary authority with British custom officials to search anywhere for smuggled goods and seize anything they pleased. United States v. Klein, 565 F.2d 183, 186 (1st Cir. 1977). See also Boyd v. United States, 116 U.S. 616, 623-625, 6 S.Ct. 524 (1886). The particularity standard dictates that the language of the warrant be sufficiently definite to enable the searcher with the warrant to reasonably ascertain and identify that which is authorized to be seized. Steele v. United States, 267 U.S. 498, 503-504, 45 S.Ct. 414 (1925); United States v. Cook, 657 F.2d 730 (5th Cir. 1981). See also Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038 (1971); United States v. Johnson,

690 F.2d 60, 64 (3d Cir. 1982).

With regard to the instant warrant,[3/] the petitioner submits that it clearly fails to meet the particularity standard. The warrant lists eleven (11) categories of items to be seized. A review of those categories immediately reveals their general and open-ended nature. The most glaring example involves item number one which authorizes the seizure of receipts and disbursement of kickback funds.

The question must immediately come to mind to one examining that item - what are kickback funds? Absolutely no guidance is given the officer executing the warrant. Unless

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3/ Set out at footnote 5 of the opinion below [United States v. Wuagneux, 683 F.2d 1343, 1350 (11th Cir. 1982)], page A-25 of the Appendix.

he happens to find a file labeled "Kickback Funds", a highly improbable occurrence, he has no way of knowing what to search for. He is left totally to his own discretion as to what to take, a clear violation of this Court's dictates. See i.e. Marron v. United States, supra.[4/]

In executing this warrant, it was not the words contained within its four corners that guided the officers for they were too general. It was the specialized knowledge of the lead agent and the Government attorney, a clear violation of the dictates of Marron v. United States, supra.

4/ Similar arguments can be made for most of the other eleven categories, i.e., Item 2 - who are"other union officials?"

The Eleventh Circuit, while acknowledging that failure to adequately enforce the particularity requirement would undermine the warrant requirement itself, noted that in "white collar" crime investigations some leeway should be given because of the complex "paper puzzle" nature of the case. United States v. Wuagneux, 683 F.2d at 1348-1349. Even if this is so, the warrant must provide sufficient guidelines and limitations for the officers for the particularity requirement to have any meaning. United States v. Wuagneux, supra at 1359 fn. #4.

The Eleventh Circuit noted in Wuagneux that the statement in Marron "as to what is to be taken, nothing is left to the discretion of the officer executing the warrant", 275 U.S. 192, 196, 48 S.Ct 74, 76 (1927) should not

be taken literally as then "no search would be possible". United States v. Wuagneux, 683 F.2d at 1349, fn. #4. With that premise as a backdrop, the Circuit went on to find categories 2 through 11 to be without fault. 683 F.2d at 1350. The Petitioner submits that while some discretion may be appropriate, particularly in "white-collar" type investigations, the type of specialized knowledge needed here to put "meat on the bones" of the skeletal warrant is violative of the Fourth Amendment. The specialized knowledge of O'Dea and Steinberg (the lead agent and Government attorney) as to what to seize and what to leave behind is no substitute for the Fourth Amendment's particularity requirement. The language of Marron though written some fifty-five (55) years ago is not dead. In fact,

even in the more recent decision of Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737 (1976), a case in which this Court noted that some relaxation of the requirements in "paper" cases may be in order, this Court reaffirmed the Marron language that "nothing [shall be] left to the discretion of the officer executing the warrant." 427 U.S. at 480, 96 S.Ct. at 2748. The action of O'Dea and Steinberg is an impermissible act of discretion even if they tried to limit the items seized. Application of LaFayette Academy, 610 F.2d 1 (1st Cir. 1979); United States v. Marti, 421 F.2d 1263 (2nd Cir. 1970), cert. den., 404 U.S. 947 [good faith of officer no substitute for particularity].

The Eleventh Circuit's attempt to allow specialized unrecorded knowledge of the agent to particularize a

which incorporates the affidavit therein. United States v. Johnson, 690 F.2d 60, 64 (3d Cir. 1982); In the Matter of Property Belonging to Talk of the Town Bookstore, supra at 1319; Application of LaFayette Academy, supra at 4; United States v. Johnson, 541 F.2d at 1315. See also Moore v. United States, 461 F.2d 1236, 1238 (D.C. Cir. 1972).

The requirement of particularity in a warrant serves a two-fold purpose. On the one hand, it limits the discretion of the executing officer as to what to seize and, on the other, it gives notice to the person subject to the search (by means of his being given a copy of the warrant) as to what the officers are entitled to seize. United States v. Marti, 421 F.2d 1263, 1268 (2nd Cir. 1970), cert. den., 404 U.S. 947. When the affidavit

is incorporated by reference in the warrant, physically accompanies it to the search site, and is left along with a copy of the warrant with the person subject to the search, then the purposes of particularity are served by the combined effect of the warrant and affidavit, the affidavit becoming, in essence, a part of the warrant. In the Matter of Property Belonging to Talk of the Town Bookstore, supra at 1319; Application of LaFayette Academy, supra at 5; United States v. Johnson, 541 F.2d at 1315; United States v. Marti, supra at 1268.

In the instant case, neither one of the two requirements for use of the affidavit to cure particularity problems was met. First, the warrant

does not use suitable words incorporating the affidavit. Second, the affidavit was not attached to the warrant, did not accompany it to the search site and was not provided to the Defendant or any of his representatives. In fact, the affidavit was sealed at the time of execution of the warrant. Thus, the affidavit should not be used to cure any particularity defect in the warrant. To do so would be to broaden the discretion of the officers and limit the ability of the searched party to insure that the officers were staying within the bounds of the Fourth Amendment.

In the instant case, the Eleventh Circuit after acknowledging that the warrant could not stand alone as to the category relating to Kickback

Funds, allowed for reference to the affidavit citing to United States v. Haydel, 649 F.2d 1152 (5th Cir. 1981), corrected, 664 F.2d 84 (5th Cir. 1981), cert. den., ___ U.S. ___, 102 S.Ct. 1721. The Petitioner submits that the Court below has mis-read Haydel which is clearly in line with the prevailing trend that the affidavit cannot be used unless attached to the warrant and, left with the searched party.

In Haydel, the Fifth Circuit found that the affidavit in that case appears in the record each time that the warrant appears and presumably had Haydel asked to see the warrant at the search site he would have also been shown the affidavit. The Court held that since the defendant has the burden of proof in a motion to suppress, it

would not infer a contrary conclusion. 649 F.2d at 1157.

In the case at bar, the contrary was clearly established. The Petitioner clearly established that the affidavit was not attached to the warrant. After presentation to the magistrate, it was promptly sealed. Neither GEORGE WUAGNEUX nor his representative could have or would have been shown the affidavit. It was certainly not left with the warrant at the search site. It was not until a considerable time after the search that the Petitioner was able to obtain a copy of the affidavit.[6/]

6/ The Eleventh Circuit's comment that the Petitioner eventually obtained a copy of the affidavit as he filed a motion to suppress (683 F.2d at 1351 fn. 6) misses the mark and does not address the problem of his knowing at the time of the search the scope of the agents' authority.

Thus, the special circumstances presumed in Haydel were not present here.

The Eleventh Circuit is striking out on new ground in this case, regarding both the expansive reading of Marron v. United States, 275 U.S. 192, 48 S.Ct. 74 (1927) and the use of an unattached and unincorporated affidavit to cure particularity problems in a warrant, contrary to the prevailing authority in all other circuits. These issues are ripe for review by this Court.

II. THE MANNER OF EXECUTION OF THE WARRANT WAS OVER-BROAD WHEN SPECIALIZED KNOWLEDGE AND DISCRETION OF THE OFFICERS AND NOT THE TEACHINGS OF THE WARRANT GUIDED WHAT WAS TAKEN.

Related to the issue of lack of particularity and the general nature of

the warrant, the manner of execution of the warrant by the agents involved in the search of the Sage offices on August 3-4, 1977, was impermissibly overbroad.

Ten to twelve agents who had no previous involvement with the Gopman investigation - the so-called warm bodies - were assigned areas to search. During the course of the two-day search, Agent O'Dea and Strike Force Attorney Steinberg would walk from room to room examining the records and deciding what to take and what to leave behind. This procedure was needed due to the specialized knowledge of O'Dea and Steinberg which made them think that certain items fit within the warrant parameters and resulted in the seizure

of the various items that were ultimately used at trial. The fact that those officers controlled what was taken and not the warrant itself was impermissible. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319 (1979); Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737 (1976).

Numerous documents were seized that were outside the scope of the warrant, such seizure directly and specifically authorized by O'Dea or Steinberg. For example, though Agent O'Dea had no knowledge that money he believed was going into Sage (as set forth in the affidavit) went into any of its subsidiaries, he gave the members of the search team a list of Sage subsidiaries. The agents then proceeded to

numerous files of Sage subsidiaries, all on instruction of O'Dea - not based upon the command of the warrant or even the affidavit both of which name no subsidiaries whatsoever. Such seizures guided by the directives of the supervisors at the search scene and not the warrant itself was improper. While, under the logic of United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981) cert. den., ___ U.S. ___, 102 S.Ct. 1971, [cited with approval in the court below, 683 F.2d at 1352-1353] the supervising agents may guide less knowledgable agents in their search, their discretion cannot broaden the search beyond the warrant's parameters.

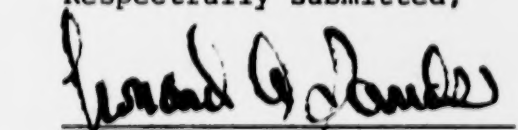
Such an approach, broadening this Court's teachings that the officers

are to minimize the intrusion, (Andresen v. Maryland, 427 U.S. 463, 482, n. 11, 96 S.Ct. 2737, 2749 n. 11 (1976)), requires review.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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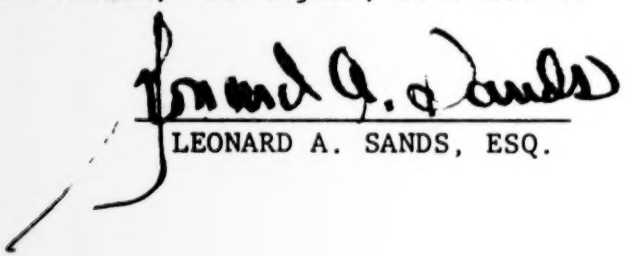
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of April, 1983, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General, Department of Justice, Washington, D.C. 20530 and to Robert J. Erickson, Esq., Appellate Section, Criminal Division, United States Department of Justice, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044.



LEONARD A. SANDS, ESQ.

district court erred in denying his motion to suppress evidence seized in a search of his offices; whether venue was improper as to Count 9, bank fraud; whether hearsay evidence was improperly admitted; and whether the evidence was sufficient as to each count. We affirm.

Because of the variety of issues raised, we will provide only a brief background at the outset and add facts as relevant to the discussion of a particular issue. Appellant was the chief executive officer and controlling shareholder of Sage Corporation, a general construction company headquartered in Hallandale, Florida. During the early and mid-1970's, Sage and its subsidiaries were engaged in the construction of a number of condominium and office building projects

in South Florida. Sage's former office administrator testified that before the corporation encountered financial difficulty during the years 1974-75, the corporation had employed several hundred persons exclusive of sub-contractors and construction personnel.

Sage Corporation attracted the attention of a Department of Justice Organized Crime Strike Force in the course of its investigations in South Florida. In particular, the investigation of two individuals, Bernard Rubin and Seymour Gopman, revealed connections between these individuals and Sage Corporation that led the Justice Department to believe appellant had engaged in a series of fraudulent and illegal schemes to obtain financial assistance for Sage.

The government eventually charged appellant with defrauding two union pension funds, an annuity fund, a real estate investment trust, the Florida Department of Insurance, and a commercial bank; in addition, the government charged that appellant had failed to adequately report various sources of income, both legitimate and illegitimate.

I-MOTION TO SUPPRESS

Appellant contends that the district court erred in denying his motion to suppress evidence obtained through a search of his offices pursuant to a warrant. He asserts five specific grounds of error: consent to a civil IRS audit, which later provided some support for the search warrant, was ineffective because the Revenue Agent conducting the audit did not disclose his affiliation with an IRS Strike Force;

the warrant did not contain a sufficiently particular description of items to be seized; the execution of the warrant was overbroad; the district court improperly limited review of the execution of the warrant to those items the government intended to use at trial; and the trial court failed to conduct an adequate hearing into allegations that the affidavit supporting the search warrant contained false statements made with reckless disregard for the truth.

A. Consent to Audit by IRS Revenue Agent[1]

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[1]Revenue Agents are civil auditors. Criminal investigators at the time of the events in question were titled Special Agents.

On December 15, 1976, Revenue Agent Chapman went to the offices of Sage Corporation under instructions to conduct a civil audit of its books and records. Chapman met with Sage's comptroller, Jack Shields, and accountant, Joseph Spina. He identified himself as an IRS Revenue Agent, displayed his credentials, and told Shields and Spina that he was there to conduct a tax audit. He did not further reveal that he was assigned to an IRS "strike force group." Shields and Spina, with the consent of appellant, agreed to cooperate with the audit. Chapman was given an office on the premises, and conducted an examination until March 9, 1977, when appellant became upset because Chapman had taken Sage records back to IRS headquarters. Although Chapman

made several unsuccessful attempts to resume the audit, his supervisor eventually recommended no further enforcement action (on the basis of the information already gathered).

The IRS "strike force" group was organized within the audit division to handle complex and specialized examinations, and was wholly independent of the Department of Justice Organized Crime Strike Force. In fact, IRS subsequently changed the name of the group to "Special Enforcement Group." Although the IRS strike force frequently conducted tax examinations of suspected organized crime figures, a relatively small percentage of the group's cases were referred to the Department of Justice Strike Force, or resulted in any criminal proceedings.

The reason the Sage audit was initiated was never definitively determined in the proceedings below. Allen Pasternak, the head of the strike force audit group, testified that the audit was probably instigated for one of three reasons: substantial newspaper coverage of Sage Corporation (of an unspecified nature); ongoing tax collection problems with Sage; or ongoing strike force investigation of various transactions involving Teamster loans, an area Sage was also involved in. Notwithstanding this confusion, the overwhelming weight of credible testimony supports the district court's findings that the audit was not initiated at the request or suggestion of the Department

of Justice,[2] and that it was an examination for civil purposes from its inception through March 1977.

---

[2]Appellant suggests a contrary conclusion from evidence that a Department of Justice Strike Force member asked Chapman to verify how two checks had been treated on Sage's books. Despite this request, the evidence is clear that Chapman's audit was not initiated by the Justice Department, and that Chapman was not turning over documents from his audit to the Justice Department. See also United States v. Chemical Bank, 593 F.2d 451, 454-57 (2d Cir. 1979) (participation of individual IRS agents in Justice Department Strike Force does not convert IRS into information gathering agency for Justice Department).

Apparently, the tax fraud counts in appellant's indictment were not a product of Chapman's audit. For purposes of the motion to suppress, however, appellant argues the audit was relevant because it enabled Chapman to provide the Department of Justice with sufficient information about Sage's records to establish probable cause for a search. Appellant argues that the consent to audit given by appellant and his representatives was ineffective, citing United States v. Tweel, 550 F.2d 297,299 (5th Cir.1977), because of Chapman's failure to advise of his affiliation with the IRS strike force. Shield and Spina testified that had this further information been disclosed, they would have insisted that the IRS proceed by summons, and

advised appellant to seek legal counsel.

While "a consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation of the Internal Revenue Agent," United States v. Tweel, 550 F.2d 297, 299 (5th Cir. 1977) (citing cases), the circumstances of this case do not indicate any deceit, trickery or misrepresentation. A party alleging ineffective consent on this ground must show affirmative acts by the agent that materially misrepresent the nature of the inquiry, and the showing must be by clear and convincing evidence. United States v. Dawson, 486 F.2d 1326, 1329 (5th Cir. 1973); United States v. Prudden, 424 F.2d 1021, 1032-33 (5th Cir.), cert. denied,

400 U.S. 831, 91 S.Ct. 62, 27 L.Ed.2d 62 (1970). See also United States v. Goss, 650 F.2d 1336, 1348-49 (5th Cir. 1981). Appellant concedes that no affirmative misrepresentation was made in this case, but insists that Chapman's silence with respect to his group affiliation was improper. Prudden suggests that silence could vitiate consent "where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading." 424 F.2d at 1032. There was no "inquiry left unanswered" here, nor an inquiry answered deceitfully. Cf. Tweel, supra. There was also no duty to speak. Although Special Agents have been instructed, ostensibly because of Fourth, Fifth and Sixth Amendment concerns, to provide Miranda-like warnings in certain

B. Particularity of Search Warrant

The Fourth Amendment requires that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. This requirement is aimed at preventing "general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022,2038, 29 L.Ed.2d 564 (1971); see generally Stanford v. Texas, 379 U.S. 476, 481-85, 85 S.Ct. 506,509-511, 13 L.Ed.2d 431 (1965)(requirement of particular description derives from Colonial resistance to general warrants and writs of assistance); United States v. Osborne, 630 F.2d 374,378 (5th Cir. 1980), cert. denied, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981). A description is sufficiently particular

when it enables the searcher to reasonably ascertain and identify the things authorized to be seized. United States v. Cook, 657 F.2d 730,733(5th Cir.1981), citing Steele v. United States, 267 U.S. 498, 503-04, 45 S.Ct.414, 416-417, 69 L.Ed. 757(1925). Failure to adequately enforce the particularity requirement would undermine the warrant requirement itself, and increase the risk of an excessive intrusion into the areas of personal rights protected by the Fourth Amendment. Cf. Cook, supra, 657 F.2d at 733 ("weigh the practical necessities of law enforcement against the likelihood of a violation of the personal rights of the one whose premises and possessions are to be searched").

At the same time, the Supreme Court has recognized that effective

investigation of complex white-collar crimes may require the assembly of a "paper puzzle" from a large number of seemingly innocuous pieces of individual evidence: "The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession." Andresen v. Maryland, 427 U.S. 463, 481 n.10, 96 S.Ct. 2737, 2749 n.10, 49 L.Ed.2d 627 (1976). See also United States v. Jacob, 657 F.2d 49,52 (4th Cir. 1981)(consider complexity of alleged fraud), cert. denied, _____ U.S. _____, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982); United States v. Abrams, 615 F.2d 541, 548 (1st Cir. 1980)(Campbell,J., con-

curring)(investigators in fraud cases do not and often cannot know in advance what precisely they will find in files). It is universally recognized that the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and that a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit. See United States v. Lowry, 675 F.2d 593,595 (4th Cir. 1982); United States v. Timpani, 665 F.2d 1, 5 (1st Cir. 1981); United States v. Morisse, 660 F.2d 132,136 (5th Cir. 1981); United States v. Bright, 630 F.2d 804,812 (5th Cir. 1980); United States v. Dennis, 625 F.2d 782,792 (8th Cir. 1980); United States v. Burns, 624 F.2d 95, 101 (10th Cir.), cert. denied, 449 U.S. 954,101

S.Ct. 361, 66 L.Ed. 2d 219 (1980); United States v. Davis, 589 F.2d 904,906 (5th Cir.), cert. denied, 441 U.S. 950, 99 S.Ct. 2178, 60 L.Ed.2d 1055 (1979). Accordingly, in cases such as the one before us involving complex financial transactions and widespread allegations of various types of fraud, reading the warrant with practical flexibility entails an awareness of the difficulty of piecing together the "paper puzzle." See also United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 745, 13 L.Ed.2d 684 (1965)("A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial

officer before acting.").[4]

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[4]Appellant places considerable emphasis on the statement in Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231(1927), that "as to what is to be taken, nothing is left to the discretion of the officer executing the warrant." 275 U.S. at 196, 48 S.Ct. at 76. As this court and others have observed, however, if this statement were construed as a literal command, no search would be possible. Gurleski v. United States, 405 F.2d 253, 257 (5th Cir. 1968), cert. denied, 395 U.S. 981, 89 S. Ct. 2140, 23 L.Ed.2d 769 (1969); see also United States v. Abrams, 615 F.2d 541, 550-51 (1st Cir. 1980)(Campbell, J. concurring) citing 2 W. LaFave, Search & Seizure § 4.6 at 96 (1978). Instead, our concern is whether the warrant provides sufficient guidelines and limitations to meet the test of particularity already described above.

The affidavit in support of the warrant before us was sworn by Vincent O'Dea, a Special Agent with the IRS assigned to the Justice Department Organized Crime Strike Force. In his affidavit, O'Dea describes how he and other investigators tracing the activities of Gopman and others had uncovered repeated mention of Sage Corporation. As a result the government suspected, among other things, that Sage was being used as an intermediary to funnel kickback funds to Gopman and others, and that an inspection of Sage's records would reveal how such transactions were accomplished. The warrant accordingly calls for the seizure of eleven categories of records

from the premises of Sage Corporation.[5]

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[5]The warrant authorized seizure of records of the following:

(1) the receipt and disbursement of kickback funds;

(2) the interest in Sage Corporation by Seymour Gopman, Bernard Rubin, and other labor union officials or nominees for these persons;

(3) records of payment to Gopman, Rubin, or other labor union leaders in cash, check, bond, property, etc;

(4) loan records reflecting the $500,000 teamster trust fund loan and its subsequent disbursement;

(5) loan records reflecting the $400,000 District Council Trust Fund loan and its subsequent disbursement;

(6) records of correspondence, agreements, loans, or other financial arrangements between Gopman, Rubin, Fortune Services, union officials or other persons or entities acting in their behalf and Sage Corporation;

(7) records of Sage's subsidiaries and any interest in them by Gopman, Rubin, or any other labor official or nominees or entities acting on their behalf;

(8) records of any financial transactions between Sage Corporation and its subsidiaries and Gopman, Rubin, or other union officials or

their nominees or entities acting in their behalf;

(9) the receipt by Sage Corporation and disbursement of funds from Ace Services, Fortune Services, Seymour Gopman or his law firm;

(10) records of any financial transactions between labor union trust funds and Sage Corporation or its subsidiaries, which are evidence of violations of 26 U.S.C. 7201, 7203 and 7206(1), 18 U.S.C. 664, 18 U.S.C. 1954, 1962, and 29 U.S.C. 501; and

(11) property that constitutes evidence of the above-enumerated offenses, fruits of the crimes named-above and property which is or has been used to commit the crimes enumerated herein.

Appellant criticizes nearly every category, contending that the descriptions give insufficient guidance on how to distinguish the records authorized to be seized and therefore that the warrant leaves an unacceptable amount of discretion to the searching officers.

At the outset, we find categories 2 through 11 unobjectionable under the principles just reviewed. These categories call for seizure of records relating to specific companies, persons and financial transactions, as those records relate to specific crimes. The type of record is described wherever possible, for example, "loan records," "correspondence" and "agreements." Appellant does not contend that seizure of documents fitting these descriptions would

not be supported by the probable cause established by Agent O'Dea's affidavit. We conclude that categories 2 through 11 are drawn as narrowly as could be expected, given the state of the Justice Department's knowledge as to what they might find and the nature and extent of criminal activities under investigation, and that the descriptions were sufficient to enable the agents to reasonably ascertain and identify the records to be seized. Cf. United States v. Timpani, 665 F.2d 1, 5 (1st Cir. 1981); United States v. Morisse, 660 F.2d 132, 136 (5th Cir. 1981); James v. United States, 416 F.2d 467, 473 (5th Cir. 1969), cert. denied, 397 U.S. 907, 90 S.Ct. 902, 25 L.Ed.2d 87 (1970).

The only potentially troubling category is No. 1, records of

cf. In re Sealed Affidavits to Search Warrants, 600 F.2d 1256 (9th Cir. 1979), the record indicates that the affidavit was made available to appellant for use in preparing the motion to suppress. In the ordinary case it is preferable that the person whose premises are to be searched be informed of the searching agents' authority at the time of the search; however this was done so far as practicable in this case, and appellant was provided with all the relevant information at a reasonable time thereafter. We conclude the affidavit may be used to explain an ambiguity in the terms of the warrant.

The affidavit states that the Strike Force investigation of Seymour Gopman led agents to believe that Gopman had received approximately $700,000 over a three-year period, representing kick-backs for arranging a contract between the South Florida Laborers' Union District Council, and Consultants & Administrators, Inc. of Chicago and its subsidiaries. This kickback scheme allegedly funneled money through Sage Corporation to two sham corporations set up by Gopman: Fortune Services, Inc., and Ace Services, Inc. Thus, category 1 of the warrant is properly construed as referring to a very specific, detailed kickback scheme and, so construed, satisfies the particularity requirement of the Fourth Amendment.

C. Execution of the Search Warrant

Appellant contends that even if the warrant itself was sufficiently limited, the Strike Force converted the search into a "general exploratory rummaging" in the course of executing the warrant. On the morning of August 3, 1977, Agent O'Dea held a briefing for the ten to twelve agents assigned to the search. O'Dea explained the progress of the investigation and reviewed the warrant and affidavit. The agents were given an opportunity to read the warrant and affidavit. The search party then moved over to the premises of Sage Corporation, where agents were assigned to search specific areas. Searching began that afternoon and continued through the next day, August 4. If an agent found a docu-

ment he believed fell within the authorization of the warrant, he removed the document and placed it in a box. If the document was part of a file, or was a page in a book or binder, the whole file or volume was removed. Agent O'Dea and Strike Force attorney Steinberg circulated throughout the premises during the search and reviewed the documents being removed. If either O'Dea or Steinberg thought a particular document did not meet the criteria of the warrant, the document was returned to the file. Between 50,000 and 100,000 individual documents were seized, representing one to two per cent of the records on the premises.

Appellant's principal complaint is that the search involved an impermissible exercise of discretion on

the part of the searching agents, and that the search was actually controlled by the special individual knowledge of O'Dea and Steinberg (rather than the guidelines supplied by the warrant). Cf. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325, 99 S.Ct. 2319, 2323, 60 L.Ed.2d 920 (1979)(scope of search cannot be left entirely to discretion of agents conducting the search). We believe the search was reasonable under the circumstances.

As the District of Columbia Circuit recently observed, the magnitude of a search is insufficient, by itself, to establish a constitutional violation; rather, the relevant inquiry is whether the search and seizures were reasonable under all the circumstances. United States v. Heldt, 668 F.2d 1238, 1254

(D.C.Cir.1981), cert. denied, _____ U.S. _____, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982); see also United States v. Edwards, 577 F.2d 883, 894 (5th Cir.) (en banc)(thoroughness not necessarily equated with unreasonableness), cert. denied, 439 U.S. 968, 99 S.Ct. 458, 58 L.Ed.2d 427 (1978). While the permissible scope of a search is governed by the terms of the warrant, Walter v. United States, 447 U.S. 649, 656, 100 S.Ct. 2395, 2401, 65 L.Ed.2d 410 (1980), by the same token a search may be as extensive as reasonably required to locate the items described in the warrant. See, e.g., United States v. Diecidue, 603 F.2d 535, 560-61(5th Cir. 1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1345, 63 L.Ed.2d 781 (1980); see also Dalia v. United States, 441 U.S. 238,

257, 99 S.Ct. 1682, 1693, 60 L.Ed.2d 177 (1979)("it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant"). Many of the same considerations that determined the sufficiency of the warrant's particular description of things to be seized also affect the reasonableness of the search itself; given the complexity of the crimes under investigation and the fact that they would be detected primarily if not exclusively through analysis and synthesis of a large number of documents, a rather extensive search could reasonably be expected.

A complaint similar to appellant's was raised in United States v. Heldt, 668 F.2d 1238 (D.C.Cir.1981),

cert. denied, _____U.S._____,102 S.Ct. 1971, 72 L.Ed. 2d 440 (1982). In Heldt, a search was initially assigned fifty agents but once the search was under way, supervising agents decided an additional fifty agents would be required. Although the original fifty had been briefed in advance on the particulars of the search, the fifty newcomers were not briefed. Noting the need for adequate preparation in such large-scale searches, the court stated:

> In conducting a search of this complexity and magnitude the agents should be familiar with the general nature of the crimes that are charged and the list of items they are authorized to seize, either through reading of the warrant or through adequate instructions or supervision from those in charge.

Id. at 1261-62. The court found that "most of the agents conducting the search were provided with as much preparation and information as was reasonable under the circumstances to enable them to carry out the warrant's complicated terms." Id. As to the remainder, who were neither briefed nor had opportunity to review the warrant and affidavit, their presence did not invalidate the search: the search team leaders were available for frequent consultation; copies of the warrant and affidavit were on the premises for their use; and the new agents were teamed up with the agents who had been previously briefed. Most relevant for our purposes was the "final measure" of having the leaders of the search review the documents identified by the agents before

making a final determination on whether to seize them. Id. The court concluded that on this basis the search as a whole was reasonable.

We find the analysis in Heldt persuasive. In fact, the search under consideration here was less extensive and involved less risk of overbreadth; all the agents were adequately briefed and supervised in this case. The "final measure" used in the Heldt search, moreover, emphasizes that such a double-check procedure, as O'Dea and Steinberg performed, is not necessarily a sign of excessive discretion; in this case as in Heldt, this practice indicates an attempt by the "responsible officials. . . to assure that[the search is] conducted in a manner that minimizes unwarranted intru-

sions into privacy." Andresen v. Maryland, 427 U.S. 463, 482 n.11, 96 S.Ct. 2737, 2749 n.11, 49 L.Ed.2d 627 (1976).

It was also reasonable for the agents to remove intact files, books and folders when a particular document within the file was identified as falling within the scope of the warrant. See United States v. Beusch, 596 F.2d 871(9th Cir. 1979). To require otherwise "would substantially increase the time required to conduct the search, thereby aggravating the intrusiveness of the search." Id. at 876-77. Also, Agent O'Dea testified that whole files were kept intact so that the agents could identify where individual documents came from and where they belonged if, as was occasionally the case, the document was ordered returned to the files after review by

government's case in chief were outside the scope of the warrant, suggesting that the search was so over-broad that all the fruits of the search should have been suppressed. Total suppression may be appropriate where the executing officer's conduct exceeds any reasonable interpretation of the warrant's provisions. See, e.g., United States v. Rettig, 589 F.2d 418, 423 (9th Cir. 1978). Courts have consistently held, however, that absent a "flagrant disregard" of the terms of the warrant, the seizure of items outside the scope of a warrant will not affect admissibility of items properly seized. United States v. Heldt, 668 F. 2d 1238, 1259-60 (D.C.Cir. 1981) (collecting cases), cert. denied, _____U.S. _____,102 S.Ct. 1971, 72 L.Ed.2d 440 (1982); United

States v. Cook, 657 F.2d 730 n.5 (5th Cir. 1981); United States v. Mendoza, 473 F.2d 692,696 (5th Cir. 1972); Brooks v. United States, 416 F.2d 1044, 1050 (5th Cir. 1969), cert. denied, 400 U.S. 840, 91 S.Ct. 81, 27 L.Ed.2d 75 (1970). Cf. Andresen v. Maryland, 427 U.S. 463, 482 n.11, 96 S.Ct. 2737, 2749 n.11, 49 L.Ed.2d 627 (1976). In our previous discussion we held that the execution of the warrant in this case was within constitutional parameters; specifically, the search was performed in a manner intended to minimize the intrusiveness of the search under the circumstances. Thus we see no grounds that would have justified the total suppression of fruits of the search, even assuming that a number of documents seized but not introduced were

outside the scope of the warrant. [7]

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7 We note also that it is readily understandable why a large number of documents seized might not have been used in the government's case in chief against appellant, considering that the primary object of the search was to gather evidence in the investigation of Gopman and others.

No prejudice to appellant resulted from this aspect of the district court's able handling of the suppression motion.

E. Allegations of Inaccuracies in Affidavit

Appellant's final argument in support of his motion to suppress is that Agent O'Dea's affidavit contained false statements made intentionally or with reckless disregard for their truth. This claim is governed by Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). In summary form, appellant's complaints were as follows: O'Dea relied on information gained from a non-governmental informant, Daniel Milano, although this individual in fact had little first-hand knowledge of the events in question and had a poor reputation for veracity; O'Dea characterized certain transactions as illegal without adequate

investigation and despite contrary evidence within his control; and in general O'Dea made unsubstantiated allegations with reckless disregard for their truth or falsity.

The district court expressed serious doubt whether the allegations, together with affidavits offered by appellant, were sufficient to meet the initial burden required by Franks before a hearing is required[8]

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[8] Franks provides as follows:
There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons ...Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.
438 U.S. at 171-72, 98 S.Ct. at 2684-2685.

Nevertheless, the court proceeded to allow testimony on this issue. The court initially set aside two hours for the Franks issue, but later announced that the hearing would continue the remainder of the day if necessary. At the hearing, appellant's counsel examined Agent O'Dea at length. Appellant also called a certified public accountant, in an attempt to show that Fortune Services and Ace Services were not "sham" corporations as described in O'Dea's affidavit, and Agent Mierow, who had participated in the Gopman investigation. After this testimony, appellant's counsel indicated that he had one further witness, a Mr. Wallace,who he had been unable to locate. The district court ordered a recess until the following morning to allow Mr. Wallace to appear. In response, appellant's counsel stated

"that should conclude our presentation of evidence." Wallace did not appear the following morning and consideration of the Franks issue was concluded. Appellant unsuccessfully urged the court to allow further time in order to procure the testimony of Milano, who was under the supervision of the federal witness protection program, and Seymour Gopman, who was by that time incarcerated in a federal prison.

In its ruling on the motion to suppress, the district court stated that in retrospect he believed appellant had failed to meet the preliminary Franks showing mandating a hearing, but that even after a "full evidentiary hearing and review of testimony taken before the magistrate," the appellant had completely failed to establish that O'Dea either

intentionally falsified his affidavit or made any statements with reckless disregard for their truth. In addition, the court found that the affidavit contained sufficient allegations to support probable cause even if the disputed language was deleted.

Because the court allowed appellant to present evidence on this issue, we will not consider whether appellant's allegations and offer of proof were sufficient to require a hearing under Franks. See United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980). Based on the evidence introduced, the district court's conclusion that no intentional or reckless falsity occurred is certainly not clearly erroneous; indeed this conclusion is supported by the entire record. At most, appellant's presentation

raised a suggestion that O'Dea negligently failed to analyze all the available data before drawing his conclusions, or that he was simply mistaken as to the significance of various transactions. Even if proven, however, such "[a]llegations of negligence or innocent mistake are insufficient." Franks, supra, 438 U.S. at 171, 98 S.Ct. at 2684. See also United States v. Astroff, 578 F.2d 133, 136 (5th Cir.1978) (en banc); cf. United States v. Young Buffalo, 591 F.2d 506, 511 (9th Cir.) (no intentional misstatement involved in attempt to "synthesize" results of complex investigation into cogent affidavit), cert. denied, 441 U.S. 950, 99 S.Ct. 2178, 60 L.Ed 2d 1055(1979).

Appellant argues that the hearing was rendered inadequate by the

district court's failure to allow more time so that he could seek testimony from Milano and Gopman. We disagree. A district court may limit the number of defense witnesses without depriving a defendant of due process, particularly when there is no offer of proof as to the proposed witness' testimony and its materiality, or when the testimony would be cumulative or irrelevant. Fast v. Wainwright, 439 F.2d 1162, 1164 (5th Cir. 1971); see also United States v. Henry, 560 F. 2d 963, 965 (9th Cir. 1977); United States v. Haynes, 554 F.2d 231, 234 (5th Cir. 1977)(citing Federal Rule of Evidence 403).[9]

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[9]Cf., McCray v. Illinois, 386 U.S.300, 312-14, 87 S.Ct. 1056, 1062-1064, 18 L.Ed.2d 62 (1967) (government's failure to identify or produce informer during preliminary hearing not violation of

due process of Sixth Amendment). We are also mindful that while due process requires a "hearing appropriate to the nature of the case..., the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself." United States v. Raddatz, 447 U.S. 667, 677, 679, 100 S.Ct. 2406, 2414, 65 L.Ed2d 424 (1980).

would have been in part cumulative, in part conclusory, and would have contributed very little to the issue of whether Agent O'Dea made any intentional or reckless statements in his affidavit. It is apparent that neither witness would have provided relevant evidence in aid of the Franks claim; accordingly, no significant prejudice could possibly have resulted from the termination of the hearing without their testimony.

II VENUE

Count 9 of the indictment charged appellant with submitting false and fraudulent statements to a FDIC-insured bank in Chicago, in violation of 18 U.S.C. § 1014 (1976). Appellant contends that the appropriate venue for this offense was the Northern District of Illinois, where the bank was located, and accordingly

Count 9 should have been dismissed for improper venue. The district court denied appellant's motion to dismiss Count 9, without prejudice to a renewal of the motion at trial.

A violation of section 1014 is indictable either in the district where the false statement is prepared and mailed, or where the statement is received. See United States v. Zwego, 657 F.2d 248, 251 (10th Cir. 1981), cert. denied, _____U.S. _____,102 S.Ct. 1275, 71 L.Ed.2d 460 (1982); United States v. Ruehrup, 333 F.2d 641(7th Cir.), cert. denied, 379 U.S. 903, 85 S.Ct. 194, 13 L.Ed.2d 177 (1964). This is the general rule of venue under the various false statement and false claim statutes. See, e.g., United States v. Blecker, 657 F.2d 629, 632 (4th Cir. 1981) (18 U.S.C. §287), cert. denied, _____U.S._____,102

S.Ct. 1016, 71 L.Ed.2d 304 (1982); United States v. Herberman, 583 F.2d 222, 226-27 (5th Cir. 1978)(18 U.S.C. § 1001). In addition, the government need only establish proper venue by a preponderance of the evidence, not by proof beyond a reasonable doubt. See United States v. Rivamonte, 666 F.2d 515, 517 (11th Cir. 1982); United States v. White, 611 F.2d 531, 534-35(5th Cir.) cert. denied, 446 U.S. 992, 100 S.Ct. 2978, 64 L.Ed.2d 849 (1980). As we said in Rivamonte, "evidence of venue need not be direct; when circumstantial evidence as a whole reasonably supports the inference that the crime was committed in the trial district, the government's burden is satisfied." 666 F.2d at 517 (cites omitted).

There is no dispute that the documents underlying Count 9 were prepared in the Southern District of Florida. At

trial, however, appellant tried to show that it was probable the documents were not mailed, but were hand-carried by appellant and presented to the bank in Chicago. No witness could recall exactly whether the documents were mailed or hand-carried. Assuming that preparation and execution alone would be insufficient and that mailing from Florida was also required, we believe there is sufficient evidence, under the standard just reviewed, to conclude the documents were mailed. Sage's office administrator, Hays, who authored and signed the cover letter in the package of documents, testified it was probable, from normal practice, that the documents were mailed. The bank officer who acknowledged receipt on behalf of the bank president indicated that it was his responsibility to open the president's mail, although in person presentations were not unheard of, and the loan officer

on the Sage account did not recall seeing appellant in Chicago around this time. Finally, the cover letter was dated April 20, 1977, and receipt was acknowledged April 25, 1977. Cf. De Rosier v. United States, 218 F.2d 420, 423,(5th Cir.) (two day interval between date of letter and receiving stamp supports inference of mailing), cert. denied, 349 U.S. 921, 75 S.Ct. 660, 99 L.Ed. 1253 (1955). This evidence supports a reasonable conclusion that the documents were prepared, executed and mailed from Florida, and accordingly venue was proper.

III ADMISSIBILITY OF AGENT MICHALAK'S TESTIMONY

Part of the government's case relating to the tax evasion charges was that appellant had failed to report as income an ownership interest in recreational leases from the Golden Horn Condominiums.

Appellant desired to bring before the jury a statement allegedly made by appellant's accountant, Joseph Spina, in a conversation with another accountant, John Pitcher, to the effect that Spina was surprised and concerned that the interests had not been reported because he was aware of them and therefore he presumed that their absence was either his fault or that of his employees. Spina was under investigation by a grand jury in a separate proceeding, however, and the district court had determined earlier in the trial that Spina would invoke his privilege against self-incrimination in response to any questions concerning his work for appellant or Sage corporation. Accordingly, Spina was declared unavailable and appellant was able to introduce the desired statement through the recollection of Pitcher, under Federal Rule of Evidence 804(b)(3)(statement

against interest; declarant unavailable).

On rebuttal the government placed IRS Agent Michalak on the stand. Michalak testified that in a conversation with Spina, Spina told him that in April 1975, before the returns in question were filed, appellant had disavowed any interest in the recreation leases. This testimony was plainly admissible, as an inconsistent statement of a declarant, to impeach Spina's credibility under Federal Rule of Evidence 806.[10]

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[10]Rule 806 provides as follows: When a hearsay statement...has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain.

See United States v. Lawson, 608 F.2d 1129, 1130 (6th Cir. 1979), cert. denied, 444 U.S. 1091, 100 S. Ct. 1056, 62 L.Ed. 2d 779 (1980). Appellant argues, however, that it would be unfair to apply Rule 806 to this case because the admission of the initial hearsay statement was based on Spina's unavailability, and this unavailability was due to the government's refusal to extend use immunity to Spina for his testimony. This argument completely misses the mark. Assuming immunity had been granted and appellant was able to use Spina himself, presumably Michalak's testimony concerning Spina's inconsistent statement would still have been used to impeach his credibility. It is difficult to see how the government unfairly took advantage of the decision not to offer Spina immunity, as the appellant urges, when the government's use of Michalak's

testimony was in no way reliant on whether Spina was available or not.[11] Michalak's testimony was properly admitted.

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[11] We nevertheless note that the decision whether to grant immunity to a witness is entirely entrusted to the executive branch, see, e.g., United States v. Chagra, 669 F.2d 241, 258-61 (5th Cir. 1982); United States v. Thevis, 665 F.2d 616, 639 (5th Cir. 1982) (Unit B) petition for cert. filed, 50 U.S.L.W. 3918 (U.S. May 10, 1982) (No. 81-2073), and that in the absence of a showing of a government misconduct the failure to grant immunity does not alter the "unavailability" of a witness who asserts the privilege against self-incrimination. See United States v. Lang, 589 F.2d 92, 95-96 (2d Cir. 1978).

IV SUFFICIENCY OF THE EVIDENCE

Appellant contests the sufficiency of the evidence underlying his conviction on each count. The test for sufficiency of the evidence is whether a reasonable jury could find the evidence supports a conclusion of guilt beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); United States v. Long, 674 F.2d 848, 853 (11th Cir. 1982); United States v. Bulman, 667 F.2d 1374, 1377 (11th Cir. 1982); United States v. Hewitt, 663 F.2d 1381, 1384 (11th Cir.1981). When applying this test we view the evidence in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). This standard of review is equally applicable to direct or circumstantial evidence. See United States v.

Rice, 652 F.2d 521, 526 (5th Cir. 1981); United States v. Hillburn, 625 F.2d 1177, 1180 (5th Cir. 1980). In addition, credibility choices are solely within the province of the jury, and we must accept whatever choice supports the jury's verdict. Hewitt, supra.

Under these guidelines there is sufficient evidence to support the jury's verdict. In general, we find that appellant is offering the same excuses, explanations and attacks on the credibility of witnesses that he offered to the jury, and that the jury was entitled to reject these contentions. We will briefly review appellant's principal complaints.

Count 7 charged appellant with mail fraud, 18 U.S.C. §1341 (1976), under the following circumstances; [12] In November 1972, Teachers Insurance and Annuity

[12] Count 1C charged the same transactions as RICO predicate offense.

Association, headquartered in New York, issued a loan commitment to Sage for $475,000 for the Andrews Office Building project. As a condition of the loan, appellant was required to produce executed leases showing a required minimum occupancy level, and original tenant estoppel letters, prior to the closing date. The government charged that appellant ascertained the building was not adequately leased, and decided to submit false documentation. Steven Brody, head of Sage's commercial rental division, testified that at appellant's direction he prepared several packages of documents, in August 1974 and February and March 1975, for submission to Teachers containing falsified leases and estoppel letters. Appellant prepared cover letters and forwarded the documents to Teachers' local agent, who mailed the packages to Teachers in New York.

Appellant points to evidence that the lender's occupancy requirement did not have to be met until March 31, 1975, and that the actual tenants of Andrews Office Building would apparently have signed estoppel letters if requested to do so. Appellant also argues that Brody's testimony was not corroborated by one individual whom Brody said participated in a meeting in which the false documents were discussed. As for the latter argument, the jury has assessed Brody's credibility and resolved conflicts in the testimony, and we see no reason to upset those determinations. The former argument may demonstrate the irony of appellant's decision to prepare false documentation, but in no way contradicts the evidence that such preparation occurred. Finally, appellant argues that use of the mails was collateral to the scheme, because the documents were hand-delivered to and

initially reviewed by Teachers' local intermediary. It is clear, however, that the mailing of the documents to Teachers was anticipated and that this mailing was an integral part of the scheme. See United States v. Kent, 608 F.2d 542(5th Cir. 1979), cert. denied, 446 U.S. 936, 100 S.Ct. 2153, 64 L.Ed.2d 788 (1980); Project, White-Collar Crime: Second Annual Survey of Law, 19 Am.Crim.L.Rev. 173, 291-92 (1981).

Regarding Count 1D, alleging a violation of 18 U.S.C. § 1954 (1976) (offer, acceptance or solicitation to influence operations of employee benefit plan), it is undisputed that appellant transferred interests worth approximately $83,000 to Gopman, as counsel to an employee welfare benefit plan, in consideration for Gopman's proposal that the fund make a $500,000 loan to one of Sage's projects. Although the Fund had not

previously made such loans, the loan was approved after Gopman's detailed presentation and assurances. These facts clearly make out a violation of section 1954.

Count 2 concerned a loan from the Southeast Florida Laborers District Council Pension Fund, of which appellant received $191,654.67. The government produced evidence that the land pledged by appellant as collateral for this loan was vastly overvalued and offered very little security. Appellant contends that the administrator of the Fund, Bernard Rubin, was unconcerned with the security of the loan, but had made the loan to keep Sage Corporation afloat as a major employer of union labor. In addition, appellant points out that the maturity date of the loan had not yet arrived at the time of indictment. Nevertheless, counsel for the fund testified the loan was in de-

fault at the time of trial. The evidence justified the jury's conclusion that appellant had converted the funds to his own use. Cf. United States v. Waronek, 582 F.2d 1158, 1161 (7th Cir. 1978) (intent to permanently deprive owner of property not an element of embezzlement); United States v. Daley, 454 F.2d 505, 510 (1st Cir. 1972) (possibility of future recovery of funds does not preclude criminal liability).

Counts 5 and 6 charged two incidents of mail fraud, 18 U.S.C. § 1341 (1976), both relating to administration of an escrow account established for Drake Towers, a condominium project constructed by Sage. Under the terms of the escrow, proceeds from the sale or lease of condominiums would be placed in the account and Sage would send periodic statements of receipts and disbursements to the lender.

On the two occasions underlying Counts 5 and 6, appellant instructed his office administrator, who was preparing the required statements, to "forget about" or show as void several checks written on the Drake Towers account. The checks were either made payable to appellant or to "cash"; the latter were endorsed by appellant. As a result, the statements received by the lender indicated a balance substantially higher than the actual balance in the account. Although appellant elicited testimony that he had explained this procedure to the administrator by saying he would replenish the sums as soon as anticipated funding came through, the lender was clearly deceived as to the administration of these funds. The lender eventually foreclosed on the underlying loan; apparently none of the sums reported in the periodic accounting statements of

the escrow account were recovered. The evidence supporting Counts 5 and 6 was more than adequate.

Count 8 charged a further mail fraud incident as follows: appellant provided a false statement of Sage's financial condition that was submitted to the Florida Department of Insurance as part of an audit of the Farmers' National Life Insurance Company. Sage and Farmers had engaged in various transactions, the end result of which was to increase the net worth of Farmers, in anticipation of the audit. During the audit an Insurance Department official noticed a debenture with Sage as obligor listed as an asset on Farmers' books. The official then requested information on Sage, including a financial statement. Farmers obtained this information from Sage and mailed it to the Insurance Department. There is

apparently no dispute that the financial statement provided by Sage was not accurate, and that the statement was part of a scheme to deceive the insurance authorities. Appellant argues only that there was no evidence that he himself provided the statement, or that he could have forseen that it would be sent through the mail. The president of Farmers testified, however, that he spoke with appellant directly, asked him to supply the statement, and appellant replied that he had one he would make available to Farmers. The president had also advised appellant that the statement had been requested by the Department of Insurance; the department is located in Tallahassee and the offices of Farmers is located in Miami. The evidence was sufficient to support the conclusions that appellant furnished the statements, and that use of the mails

was reasonably forseeable. See United States v. Bright, 588 F.2d 504, 510 (5th Cir.), cert. denied, 440 U.S. 972, 99 S.Ct. 1537, 59 L.Ed.2d 789 (1979).

Count 9 charged the submission of a false statement to the North Bank of Chicago, Illinois, in support of a loan to W & R Corporation, a Sage subsidiary, in violation of 18 U.S.C. § 1014 (1976). The financial statement for W & R submitted to the bank, dated December 31,1976, indicated the corporation was solvent and had had receipts and income in the preceeding eight months. The bank officer assigned to this loan testified that he had placed reliance on this statement. The government introduced evidence, however, that W & R Corporation was dormant by the end of 1976, and pointed out several other apparent deviations from normal

procedure in connection with the statement. Although appellant argues the evidence failed to show the statement was materially false, this question was for the jury and there is sufficient evidence to support their conclusions. See United States v. Greene, 578 F.2d 648, 657 (5th Cir. 1978), cert. denied, 439 U.S. 1133, 99 S.Ct. 1056, 59 L.Ed.2d 96 (1979).

We also conclude there was sufficient evidence that appellant understated his income on his individual income tax returns as charged in Counts 10 through 13. Each count charged understatement of income for a separate year. The government identified three categories of omitted income: income generated in each year from appellant's interest in various recreation leases from condominium projects; $75,000 derived from appellant's officers' loan account in 1974; and

$555,000 derived from a loan in 1976. While appellant does raise a significant question whether the $75,000 was taxable income, and also argues the $555,000 was not adequately described by the evidence to determine whether it represented economic gain to appellant, we need not pursue these matters. The omission of appellant's interest in the recreational leases was adequately shown for each year charged in the indictment; accordingly, the convictions for understatement of income must be affirmed.

V CONCLUSION

In summary, we have found no reversible error in the arguments raised by appellant. His convictions are therefore affirmed.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 80- 5763

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GEORGE WUAGNEUX,
Defendant-Appellant

Appeal from the
United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion August 23, 11 Cir., 1982)

(January 14, 1983)

Before HATCHETT and ANDERSON,
Circuit Judges,
INGRAHAM, Senior Circuit Judge,
Fifth Circuit, sitting by
designation

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

[Transcript of oral order
of District Court denying
Motion to Suppress]

THE COURT: Gentlemen, I am sorry that I did not have time to prepare a formal order, so I will just take what I have dictated and read it into the record. May I say, before we start, because we will take it after, the defendant has moved the Court to suppress certain evidence pursuant to a search warrant for the following reasons:

(A) That the evidence was seized as a result of a ruse conducted by the IRS agent's failure to identify himself and the nature of his audit;

(B) That the affidavit upon which the warrant was based contained statements made with deliberately false or made with reckless disregard for the truth, thereby invalidating the search warrant;

(C) That the search warrant itself lacked sufficient particularity to justify the seizure of all of the items taken by the Government; and

(D) That items were illegally seized outside the scope of the warrant.

The Court has accorded the defendant a full evidentiary hearing on his motion to suppress and has carefully considered all of the evidence, and I mean all of the evidence, taken before the Magistrate. I now rule that the search warrant at issue complied with all constitutional requirements and properly authorized the seizure of the items taken. The defendant's motion to suppress will be denied.

The Court finds that the evidence presented was insufficient to establish that the agent perpetrated a ruse upon the defendant by conducting a criminal audit instead of a civil audit. The

Court finds that the agent, Mr. Chapman, was, in fact, conducting a civil audit and therefore there was no deception by the agent mandating suppression under United States vs. Tweel.

(2) The defendant's challenge as to the truth of certain statements contained in the search warrant affidavit is without merit. Under the law set forth in Franks vs. Delaware, a defendant is permitted to challenge a search warrant under certain conditions. The Court feels that a defendant is entitled to an evidentiary hearing on the issue of the veracity of statements contained in a search warrant affidavit only after making a preliminary showing that those statements are either deliberately false, or made with reckless disregard for the truth. Therefore, initially, defendant's allegations must be accompanied by an offer of

proof pointing out specifically that portion of the warrant affidavit that defendant claims is false. The allegations should be accompanied by a statement of supporting reasons for defendant's contentions. Further, even if the defendant meets these requirements, no hearing is required if there remains sufficient content in the warrant affidavit to support a finding of probable cause.

Now, out of an abundance of caution, the Court did not rule initially on the validity of the defendant's preliminary showing, but I elected to have a full evidentiary presentation. The Court now specifically finds that the defendant has failed to make the required Franks preliminary showing mandating an evidentiary hearing.

Notwithstanding the Court's finding that the defendant failed to make the preliminary showing, the Court

further finds that the defendant has completely failed to establish, after a full evidentiary hearing and review of testimony taken before the Magistrate, that the affiant either deliberately falsified the affidavit or made any statements in the affidavit in reckless disregard for the truth.

In addition, careful scrutiny of the warrant affidavit reveals that even had all other statements challenged by the defendant been stricken, there still remained sufficient averments in the affidavit to support a finding of probable cause.

As to the third contention, the Court has carefully reviewed the search warrant and concludes that it met the Fourth Amendment's requirement that it contain a "particular description of the things to be seized," as required by the Supreme Court in Andresen vs.

Maryland.

It is clearly the law in this circuit that evidence not described in a valid search warrant but having a nexus with the crime under investigation, may be seized at the same time the described evidence is seized. That is United States vs. Kane.

Furthermore, when an exact description cannot be obtained, the warrant may properly describe the generic class of items to be seized. That is United States vs. Davis, and it is the finding of the Court in this case.

The Court finds that the challenged items were either specifically described in the warrant or had a sufficient nexus with the investigation conducted by the Government to justify the seizure.

Item four and the final contention is the defendant's last point that some of the items were illegally seized outside the scope of the warrant is without merit. The Court makes a Specific finding that the items that the Government has announced it intends to use at trial were not seized outside the scope of the search warrant.

Conclusion: The Court concludes by its ruling that the search warrant was properly issued upon a finding of probable cause based upon Agent O'Dea's affidavit, that the warrant contained a sufficiently particular description of the items seized, and that the agents did not exceed the scope of their authority when they conducted the search and seizure pursuant to the warrant. Motions are denied.